

1 JUSTIN X. WANG (CSB #166183)
 2 PEGGY A. SHIH (CSB #197545)
 3 **BAUGHMAN & WANG**
 4 111 Pine Street, Suite 1350
 San Francisco, California 94111
 Telephone: (415) 576-9923
 Facsimile: (415) 576-9929

5 Attorneys for Plaintiffs

6 **UNITED STATES DISTRICT COURT**
 7 **NORTHERN DISTRICT OF CALIFORNIA**
 8 **SAN FRANCISCO DIVISION**

9 HONGJUN YUAN and MEIMEI FU,) Case No.: C 07-3750 JL
 10 Plaintiffs)
 11 v.) **PLAINTIFF'S OPPOSITION TO**
 12 MICHAEL CHERTOFF, Secretary,) **DEFENDANTS' EX PARTE**
 Department of Homeland Security and) **MOTION PURSUANT TO**
 13 ROBERT S. MUELLER, Director of the) **FED. R. CIV. P. 56(f)**
 Federal Bureau of Investigation,)
 14 Defendants.) District Judge: Honorable James Larson
 15

16 **I. INTRODUCTION**

17 On July 24, 2007, Plaintiffs Hongjun Yuan and Meimi Fu ("Plaintiffs") served the United
 18 States Attorney's Office a Complaint for Writ in the Nature of Mandamus. On September 7,
 19 2007, Plaintiffs filed a Motion for Summary Judgment ("Plaintiffs' Motion"). Without any prior
 20 notice to the Plaintiffs, on September 10, 2007, Defendants filed an ex parte motion pursuant to
 21 Fed. R. Civ. P. 56(f) ("Defendants' Motion"). Plaintiffs hereby oppose Defendants' Motion and
 22 request that the Court go forward on Plaintiffs' Motion hearing, scheduled for October 17, 2007.
 23

24 **I. ANALYSIS**

25 Ex parte motions¹ are granted only on rare occasions and after a showing of good cause.

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27 ¹ In the Northern District, an ex parte motion (defined as a motion filed without notice to
 28 the opposing party) "must include a citation to the statute, rule or order which permits the use of
 an ex parte motion to obtain the relief sought." Civ. L.R. 7-10.

1 *In re Intermagnetics America, Inc.*, 101 BR 191, 192-193 (C.D. Cal. 1989). An ex parte
2 application must show why the moving party should be allowed to “go to the head of the line in
3 front of all other litigations and receive special treatment.” *Mission Power Engineering Co. v.*
4 *Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal 1995). Ex parte proceedings have been
5 identified as posing a great threat to the adversary system, which allows both sides to have their
6 say, therefore promoting accuracy, fairness, and consistency. Although adversary proceedings
7 will not eliminate all error, unfairness, or inconsistency, the risk of such dangers increase when
8 one side proceeds ex parte. *In re Intermagnetics America, Inc.* 101 BR at 192.

9 The Defendants have failed to show good cause. First, Defendants have failed to indicate
10 how it will be irreparably prejudiced if Plaintiffs’ Motion, as scheduled for October, is heard. In
11 addition, Defendants have failed to indicate that they are without fault in creating the crisis that
12 requires ex parte relief. *Id.*

13 Defendants’ Motion pursuant to Fed. R. Civ. P. 56(f) should also be denied because
14 Plaintiffs’ Motion was issued well within the statutory allowance, and Defendants have sufficient
15 opportunity to investigate the claims raised in Plaintiffs’ Complaint.

16 Plaintiffs’ Motion was not premature. Federal Rule of Civil Procedure 56(a) permits a
17 party asserting a claim to move for summary judgment any time after the expiration of 20 days
18 from the commencement of the action. Plaintiffs’ Motion was initiated well after the 20-day
19 holding period.² Defendants have sufficient opportunity to investigate the claim raised in
20 Plaintiffs’ Complaint.

21 Defendants reliance on Federal Rule of Civil Procedure 56(f) is procedurally deficient.
22 The rule provides that the Court may refuse the application for judgment or may order a
23 continuance to permit discovery where “it appears from the affidavits of a party opposing the
24 motion that the party cannot for reasons stated present by affidavit facts essential to justify the
25 party’s opposition.” Fed. R. Civ. P. 56(f). The Defendants were required to show the following:
26 1) facts establishing a likelihood that controverting evidence may exist as a material fact; 2) the

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28 ² Commencement of the action occurred on July 20, 2007. Plaintiffs’ Motion was filed
on September 7, 2007.

1 specific reasons why such evidence cannot be presented at the present time; and 3) the steps or
 2 procedures which the opposing party intended to utilize to obtain such evidence.

3 *Aristocrat Technologies Australia PTY Ltd. v. International Game*, 491 F. Supp. 2d 916, 935
 4 (N.D. Cal. 2007). Furthermore, Defendants must explain how additional time will enable them to
 5 rebut Plaintiff's allegations of no genuine issue of material fact. *Id.* Defendants' affidavit fails to
 6 make the necessary showing. In fact, this case does not implicate a complex set of facts requiring
 7 additional discovery. The facts are quite simple. Plaintiffs filed adjustment of status applications
 8 (Form I-485) on January 18, 2005. A prerequisite to the Form I-485, Plaintiff Hongjun Yuan's
 9 Immigrant Petition for Alien Worker (Form I-140), was approved on July 5, 2005. However,
 10 while Plaintiffs have complied with the requirements for eligibility under the statute, the I-485
 11 applications have remained pending with no further action for over two years and two months.

12 Mandamus relief in adjustment of status cases, such as this one, can be granted solely on
 13 the length of the delay. *Aboushaban v. Mueller*, No. C 06-1280 BZ, 2006 WL 3041086, at *2
 14 (N.D. Cal. Oct. 24, 2006); *Singh v. Still*, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007). In a case
 15 before this district, Judge Alsup found that a two year delay to be unreasonable as a matter of law.
 16 *Gelfer v. Chertoff*, 2007 WL 902383 at *2 (N.D. Cal. March 22, 2007). Plaintiffs filed their I-485
 17 applications over two years and seven months ago. Defendants have a duty to complete the
 18 adjudication of Plaintiffs' adjustment of status applications within a reasonable time under the
 19 Mandamus Act and the and the Administrative Procedure Act. Not only is the evidence within
 20 the Defendants control, but their motion is simply a delaying tactic that will ultimately reveal
 21 incontrovertible facts.

22 III. CONCLUSION

23 For the reasons set forth herein, Plaintiffs respectfully request that the Court deny the
 24 Defendants' Motion and go forward with Plaintiffs' Motion hearing, as scheduled, for October 17,
 25 2007.

26 Dated: September 13, 2007

27 Respectfully submitted,

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Justin. X. Wang
Attorney for Plaintiff